

CARPET ET CETERA, INC.,

PLAINTIFF,

V.

MICHAEL J. FORDE AND PAUL O'BRIEN,
AS TRUSTEES OF NEW YORK CITY DISTRICT
COUNCIL OF CARPENTERS WELFARE FUND,
NEW YORK CITY DISTRICT COUNCIL OF
CARPENTERS VACATION FUND, NEW YORK
CITY DISTRICT COUNCIL OF CARPENTERS
APPRENTICESHIP, JOURNEYMAN RETRAINING
EDUCATIONAL AND INDUSTRY FUND, NEW
YORK CITY DISTRICT COUNCIL OF
CARPENTERS CHARITY FUND AND NEW YORK
CITY AND VICINITY CARPENTERS
LABOR-MANAGEMENT CORPORATION,
DEFENDANTS

06 CV 6993 (BSJ)

Opinion and Order

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

Plaintiff Carpet et Cetera ("Carpet") filed this Complaint seeking an order to stay an arbitration demand made by Defendants Michael J. Forde and Paul O'Brien, as Trustees of the New York District Council of Carpenters Pension Fund, New York City District Council of Carpenters Welfare Fund, New York City District Council of Carpenters Vacation Fund, New York City District Council of Carpenters Apprenticeship, Journeyman Retraining Educational and Industry Fund, New York City District Council of Carpenters Charity Fund, and New York City and Vicinity Carpenters Labor-Management Corporation (jointly

referred to as the "Benefit Funds"). Defendants have cross-moved to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 4. For the reasons set forth below, Plaintiff's motion to stay arbitration is DENIED and Defendants' motion to compel arbitration is GRANTED.

Background

Plaintiff Carpet et Cetera is a retailer and installer of carpeting and other flooring. On March 18, 2005, Carpet entered into a collective bargaining agreement, known as the Independent Resilient Floor Coverers Agreement ("Collective Bargaining Agreement" or "Agreement"), with the District Council of New York and Vicinity of the United Brotherhood of Carpenters and Joiners of America ("Carpenters Union" or "Union"). Article XIV of the Agreement contains a broad arbitration clause that provides that "[a]ll complaints, disputes and differences concerning the application, interpretation, effect, purpose or breach of any term or condition of this Agreement, or in the event there shall exist any claim, demand, dispute or controversy between the parties hereto," not resolved by negotiation, "shall be submitted to arbitration." (Keller Decl., Ex. 2, Art. XIV.) In addition, Article XIV, Section 3 states that "[i]t is the intent of the parties hereto that all disputes between them, both within and outside of the Agreement,

shall be submitted to arbitration and that no defense to prevent the holding of the arbitration shall be permitted." (Id.)

Pursuant to Article XI of the Agreement, Plaintiff was required to make monetary contributions to the Benefit Funds for each hour worked by its covered employees. (See Keller Decl., Ex. 2, Art. XI, § A.) Article XI also provides that upon request employers are required to produce their books and records to the Trustees of the Benefit Funds or their designated auditing representative, to enable the auditor to "ascertain and independently verify that the proper contributions . . . have been paid." (Id. § B.) Failure to "furnish the proper records when requested, for the purpose of completing an audit" is a violation of the Agreement. (Id. § A.) Article XI also gives either party the right to seek arbitration "[s]hould any dispute or disagreement arise between the parties hereto, or between the Union and any Employer-member signatory hereto, concerning any claim arising from payments to the Fund of principal and/or interest which is allegedly due . . ." (Id. § H.) Lastly, Article XI, Section G recognizes the right of the Benefit Funds to commence legal proceedings before a judge or arbitrator to enforce obligations as to the funds. (Id. § G.)

Article XVII provides that the Agreement "shall continue until July 1, 2006 and shall be renewed automatically for one year intervals thereafter unless notice to the other . . . has

been provided by either party . . . no more than ninety (90) days nor no less than sixty (60) days before the contract expiration that such party seeks to negotiate a new contract or modify or amend this Agreement through negotiations." (Id. Art. XVII.)

Plaintiff contends that the Carpenters Union materially breached and substantively repudiated the Agreement in February 2006. The Carpenters Union is not a party to this litigation.¹ According to Carpet, the Union refused to provide workers for Carpenters Millennium Hilton project and demanded that Carpet provide an undertaking to guarantee payment of fringe benefits – a request which Carpet did not honor. Carpet prepaid the fringe benefits for two men and the Union referred two workers. After two days, the Union refused to refer any more members to Carpet, and ordered its members not to report for work at Carpet's Millennium Hilton project site. Plaintiff asserts that on or about February 23, 2006, it contacted the Carpenters Union to request that it refer workers to Plaintiff for the Millennium Hilton project. According to Plaintiff, in response to its request a Carpenters Union business agent informed Carpet that the Union was rescinding the Agreement and would not refer any

¹ Because the Carpenters Union is not a party to this litigation and neither party has submitted any documentary evidence describing the Union's version of the events that took place in February 2006, the Court's description is drawn solely from Plaintiff's papers.

members to Plaintiff. By letter dated April 17, 2006 Carpet notified the Carpenters Union of its intent to modify or terminate the Agreement.

Some time prior to April 7, 2006, Defendants requested to audit Plaintiff's books and records, and Plaintiff refused. By letter dated April 7, 2006 the Benefit Funds notified Carpet that their refusal to allow the auditing of their books and records audited for the period March 18, 2005 "to date" was in direct violation of the Collective Bargaining Agreement and "[u]nless permission is given within seven (7) days for an audit, either arbitration will be scheduled or a suit will be filed against your company in federal court seeking an order for your company to comply with the audit." (Keller Decl., Ex. 6.) On April 19, 2006 Defendants sent Carpet a Notice of Intention to Arbitrate. Carpet claims that it sought to amicably resolve the issue by offering an audit for the period March 18, 2005 to February 22, 2006, but Defendants' auditors repeatedly cancelled the scheduled audit. Defendants do not respond to this allegation. Both parties agree that the audit never took place, and on August 22, 2006 Defendants served a new Notice to Arbitrate seeking to compel Carpet to permit the Benefit Funds to "conduct an audit of its books and records for the period 3/18/2005 through date to determine whether is in (sic)

compliance with its obligation to contribute to the Funds."

(Keller Decl, Ex. 1.)

Discussion

Carpet seeks this stay of arbitration on the grounds that the Carpenters Union materially breached and substantively repudiated the Collective Bargaining Agreement in February 2006, when it refused to refer members to Carpet and ordered its members not to report for work at Carpet's Millenium Hilton Project site. In addition, Plaintiff claims that in response to the Union's conduct, it sent a letter dated April 17, 2006 to the Carpenters Union terminating the Agreement. Accordingly, Plaintiff argues it cannot be bound to the arbitration provisions in a terminated contract.²

A. The Carpenters Union's Alleged Repudiation

Plaintiff's main argument is that the Agreement "with the Carpenters Union was no longer in effect when defendants demanded arbitration because the Agreement had been repudiated and rescinded by the Carpenters Union and terminated by the

²The Agreement at issue contains two arbitration provisions. Under Article XI, Carpet was required to arbitrate "any dispute or disagreement . . . concerning any claim arising from payments to the Fund." (Keller Dec., Ex. 2, Art. XI, § H.) Under the arbitration clause in Article XIV, the Grievance Procedure section, Carpet was required to arbitrate "all complaints, disputes and differences concerning . . . breach of any term or condition of this Agreement." (Ex. 2, Art. XIV, § 1.) Therefore, if Carpet believes the Union's conduct constitutes a material breach, the terms of the Agreement require it to arbitrate this claim.

Company." (Pl. Memorandum of Law in Support of its Motion to Stay Arbitration 5.) Plaintiff asserts that the issue before the Court is whether "a collective bargaining agreement ever existed or if one ceased to exist." (Id. at 6.) The Court disagrees. As evidenced by Plaintiff's own Exhibit 2, Carpet was a signatory employer to the Collective Bargaining Agreement, which contained two arbitration provisions; therefore, there is no question that there was a valid agreement pursuant to which Carpet was obligated to arbitrate claims of a material breach of the Agreement or issues arising out of its contributions to the Benefit Funds. Thus, the issue in this case is whether the Union's conduct in February 2006 repudiated the Agreement and thereby discharged Carpet's obligation to arbitrate. As an initial matter the Court must decide whether the Carpenters Union's alleged repudiation is a "question of arbitrability" to be decided by the Court unless the parties have clearly agreed otherwise, or whether it is a "gateway matter presumptively reserved for the arbitrator's resolution." See Mulvaney Mechanical v. Sheet Metals Internat'l, 351 F.3d 43,45 (2d Cir. 2003).

In Mulvaney Mechanical v. Sheet Metals International, 351 F.3d 43 (2d Cir. 2003), the Second Circuit held that "the issue of repudiation most closely resembles the defenses to arbitrability such as waiver, estoppel, or delay that the

Supreme Court [in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123, 124 S. Ct. 588 (2002)] listed as questions properly decided by arbitrators." Mulvaney, 351 F.3d at 46. The Mulvaney court acknowledged that "the issue of the union's alleged repudiation . . . raises questions about the ongoing validity of the underlying contract and therefore presents a substantive challenge to the authority of the arbitrator." Id. at 46. Nevertheless, the court concluded that an alleged repudiation "presumes the one-time existence of a valid contract and goes to the enforcement of that contract. Upon repudiation, a contract does not cease to exist, but merely becomes voidable, and the non-repudiating party may enforce the contract or rescind it." Id. (citing 13 Richard A. Lord, Willinston on Contracts § 39:37, at 663-68 (4th ed. 2000)). Therefore, the court concluded that determining whether the union repudiated the contract was a matter reserved for the arbitrators. Id.

In the present case, the court finds that Carpet was a signatory to a collective bargaining agreement containing a broadly worded arbitration provision. The "Grievance Procedure" in Article XIV of the Collective Bargaining Agreement states that

Section 1. All complaints, disputes, and differences concerning the application, interpretation, effect, purpose or breach of any term or condition of this Agreement, or in the event here shall exist any claim, demand, dispute or controversy between the parties

hereto, . . . the parties shall first attempt to settle and adjust such dispute, claim, demand, or controversy by negotiation.

Section 2. Any grievance not resolved shall be submitted to arbitration.

(Keller Dec., Ex. 2, Art. XIV.)

Pursuant to this broadly worded grievance arbitration clause, the issue of whether Carpet repudiated the Agreement is itself subject to the arbitration clause. Furthermore, as stated by the Mulvaney court, the Union's alleged repudiation does not void contract and automatically discharge Carpet from its obligation to arbitrate. Mulvaney, 351 F.3d at 46. Instead, upon repudiation the contract is still in existence but is voidable by the non-repudiating party. Thus, the issue is "the ongoing enforceability of an agreement that the parties had unquestionably reached." Id. Accordingly, the Court concludes that determining whether the Union's conduct amounted to a complete repudiation of the Agreement such that Carpet was excused from its obligations to arbitrate, is a question properly answered by the arbitrators.

Plaintiff attempts to distinguish this case from Mulvaney by asserting that the issue here is not simply whether the Union repudiated the Agreement, but whether the contract was rendered void as a result of "repudiation plus other conduct," which

revealed the intent of the parties not to rely on the Agreement.³ (Pl. Reply Memorandum at 2.) However, the means by which an agreement was repudiated does not transform the issue from one which is properly decided by the arbitrators to one reserved for the courts. According to the Restatement (Second) of Contracts a repudiation can be either a statement or a voluntary affirmative act indicating that the party will commit a breach. Restatement (Second) of Contracts § 250 (1981) ("A repudiation is (a) a statement by the obligor or obligee indicating that the obligor will commit a breach that would itself give the obligee a claim for damages for total breach under § 243, or (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." (emphasis added)). Therefore, the Court concludes that whether the alleged repudiation is by a simple statement or by words and conduct indicating that the party does not intend to perform the contract, the rule enunciated in Mulvaney still applies: The

³ The Carpenter Union's alleged repudiation is a disputed issue of fact. Plaintiff claims that the Union repudiated the Agreement in February 2006 by refusing to refer members to Carpet, ordering its members not to report to Carpet's Millennium Hilton project site, and disclaiming its interest in the agreement. (Compl. ¶¶ 11-12.) Defendants are trustees of the Benefit Funds and do not represent the Union, yet in their answer they have denied the Union's repudiation of the Agreement and the Union's receipt of the letter dated April 17, 2006. Answer ¶¶ 11, 13. Defendants aver that the removal of workers from the project site was not a repudiation because it was expressly provided for in the Collective Bargaining Agreement. Answer ¶ 12. Pursuant to the Court's holding, this is an issue to be resolved by the arbitrators.

question of whether an alleged contract has been repudiated is to be decided by the arbitrators.

B. Carpet et Cetera's Alleged Termination

Plaintiff also argues that the Court should stay the arbitration because Plaintiff terminated the Agreement by its letter dated April 17, 2006, in which Plaintiff gave notice to the Carpenters Union that it was seeking to modify or terminate the Agreement. Plaintiff argues that this letter formally terminated the Agreement pursuant to Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158. Under Section 8(d) of the National Labor Relations Act, written notice served upon another party to a collective bargaining agreement does not automatically terminate the agreement. See 29 U.S.C. § 158 (2000). Section 8(d) provides that a collective bargaining agreement "continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." Id. Thus, service of the letter upon the Carpenters Union did not automatically terminate the agreement. Moreover, Plaintiff presents no evidence that it fulfilled the other requirements of Section 8(d).⁴ By shifting

⁴Section 8(d) of the National Labor Relations Act, a party seeking to terminate a collective bargaining agreement, must also offer "to meet and

the emphasis from the Carpenters Union's conduct to its own termination, Carpet seeks to bring this case within the rule that questions of termination are presumptively reserved for the courts because "[t]he question of whether [a party's] conduct terminated the agreement is akin to the question of whether a binding agreement to arbitrate exists at all." Mulvaney, 351 F.3d at 45. The Court finds that Carpet's partitioning of the events in this way is a red herring. As stated above, Carpet's April 17, 2006 letter did not automatically terminate the agreement. Whether the Union's alleged repudiation, plus Carpet's letter terminated the agreement is an open question. The alleged repudiation and the April 17, 2006 letter must be viewed as a series of events in response to each other. Accordingly, the Court finds that determining the effect of Plaintiff's letter in response to the Union's conduct is an issue to be decided by the arbitrators.

Even assuming the Collective Bargaining Agreement was terminated, Carpet can still be obligated to arbitrate claims "arising under" the terminated Agreement. In Nolde Brothers Inc. v. Bakery Workers, 430 U.S. 243, 97 S. Ct. 1067 (1977), a union brought suit under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, to compel the employer to submit to

confer with the other party for the purpose of negotiating a new contract," and notify "the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute." 29 U.S.C. § 158.

arbitration. The employer in Nolde ceased operations four days after the termination of a collective bargaining agreement, and although the employer settled the employee wage claims, he refused to pay severance called for in the agreement. In addition, the employer refused to submit the dispute to arbitration. The Supreme Court held that "whatever the outcome, the resolution of the claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute, therefore, although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." Nolde, 430 U.S. at 249, 97 S. Ct. at 1071 (emphasis in original). The Court thus found that the employer had to submit to arbitration. In reaching this conclusion, the Court stated that "the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. . . . [W]here the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." Id. at 255. The collective bargaining agreement at issue in the present case contains a broadly worded arbitration provision that similarly fails to exclude from

arbitration disputes arising after the termination of the agreement. Thus, the Court finds that the parties "intended to arbitrate all grievances arising out of the contractual relationship." Id.

In Litton Financial Printing Division v. National Labor Relations Board, 501 U.S. 190, 111 S. Ct. 2215 (1991), the Supreme Court reaffirmed its holding in Nolde. In Litton the Court held that layoffs, which took place after the collective bargaining agreement had expired, did not "arise under" and were thus not covered by the collective bargaining agreement. But in reaching this conclusion, the Litton Court explained that post-expiration grievances arise under a collective bargaining agreement, and are therefore arbitrable where: 1. the dispute "involves facts and occurrences that arose before termination;" 2. "where an action taken after expiration infringes a right that accrued or vested under the agreement;" or 3. "where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the agreement." Litton, 501 U.S. 205-06, 111 S. Ct. 2225. In the case at bar, the demand for arbitration arises out of Plaintiff's obligation to permit the Benefit Funds to audit Carpet's books and records. The Benefit Funds' request pre-dates the April 17, 2006 letter by which Plaintiff claims it terminated the contract. The Benefit Funds' letter dated April 7, 2006, explained to Carpet

that their refusal to turn over their books and records was in violation of the Agreement, and if they failed to permit the audit of their books within seven days the Benefit Funds would either schedule arbitration or would commence suit in federal court seeking an order for Carpet to comply with the audit. (Pl. Ex. 5.) Thus, the Court finds that because the dispute involves facts and occurrences that arose before termination, Carpet et Cetera's obligation to arbitrate survives the alleged contract termination.

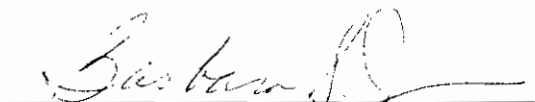
Plaintiff argues that the Benefit Funds' request to audit Plaintiff's books and records post-dates the Union's alleged repudiation of the agreement; therefore, Carpet is not required to honor such a request. Pursuant to the Court's holding above, that is an argument to be presented to the arbitrators. Even if the Union's conduct amounts to a repudiation of the contract, "upon repudiation, a contract does not cease to exist, but merely becomes voidable, and the non-repudiating party may enforce the contract or rescind it." Mulvaney, 351 F.3d at 46. Therefore, the Court finds that at the time the Union made its request the Agreement was not yet terminated, thus the Benefit Funds' request "arose under" the Agreement and any dispute concerning such a request is to be resolved through arbitration.

Conclusion

For the foregoing reasons, Plaintiffs motion to stay the arbitration is DENIED and Defendants motion to compel Carpet et Cetera to arbitrate, pursuant to the Court's power under the Federal Arbitration Act, 9 U.S.C. § 4, is hereby GRANTED.

The Clerk of Court is hereby directed to CLOSE this case.

SO ORDERED:

A handwritten signature in cursive script, appearing to read "Barbara S. Jones", is written over a horizontal line.

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

Dated: New York, New York

October 16, 2006